IN THE

Supreme Court of the United States

October Term 1974

74-551

H. CLIFFORD LEE, et al.,

Petitioners,

vs.

HERSCHEL S. ARROWOOD, et al.,

Respondents.

BRIEF OF RESPONDENTS HERSCHEL S. ARROWOOD AND MARY JANE DICKMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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IN THE

Supreme Court of the United States

October Term 1974

No. 551

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth Bush, a/k/a Edyth D. Bush, a/k/a Mrs. A. G. Bush, deceased,

Petitioners,

vs.

HERSCHEL S. ARROWOOD, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased, and as a former director of The Bush Foundation; MARY JANE DICKMAN, individually and as a Co-Executor under the Last Will and Testament of Archibald G. Bush, deceased; CECIL C. MARCH, individually and as a director of The Bush Foundation; ELMER L. ANDERSEN, individually and as a director of The Bush Foundation; Honorable EDWARD J. DEVITT, individually and as a director of The Bush Foundation; RICHARD L. POST, individually and as a former director of The Bush Foundation; REUEL D. HARMON, individually and as a director of The Bush Foundation; THE BUSH FOUNDATION, a Minnesota Non-Profit Corporation, THOMAS MALONE, as Clerk of the Probate Court, Ramsey County, Minnesota; JOSEPH P. LA NASA, as Clerk of the District Court of Ramsey County, Minnesota; and WARREN R. SPANNAUS, as Attorney General of the State of Minnesota,

Respondents.

BRIEF OF RESPONDENTS HERSCHEL S. ARROWOOD AND MARY JANE DICKMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents pray that the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit in the above entitled matter be denied, and respectfully show to the Court:

We believe that the issues in the case originally presented to the trial court below have been decided by the most recent Minnesota Supreme Court Decision, *In re Estate of Archibald G. Bush*, —— Minn. ——, No. 44707, decided November 22, 1974 whereby the instant case is now moot as so ably argued by the other Respondents herein and whose brief on the subject we adopt as our own. We will, therefore, briefly direct our reply to the four reasons urged by the Petitioners as grounds for this Court's grant of a writ of certiorari.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

1. The decision below is not in outright conflict with this Court's decision in *United States v. Michigan National Corporation*, —— U.S. ——, No. 73-1737, decided October 21, 1974. The facts present in the *Michigan National Corporation* case upon which this Court held a stay rather than a dismissal was required are notably absent in the instant case. There the Appellant was faced with the very possible bar of bringing its anti-trust action if such were not commenced within the thirty (30) day period following a regulatory Board's approval to a transaction. In that case the approval had already been given and the thirty (30) days statutory period of commencing an anti-trust action had in fact begun to run. The application of the Abstention Doctrine with a stay rather than a dismissal clearly was called for in that case. Petitioners herein have not

shown and cannot show that their cause of action, if one exists, will be barred by such a stringent limitation as was present in the *Michigan National Corporation* case.

2. Due process is not denied by the Court's failure to adjudicate a breach of contract claim asserted by the Petitioners in the action dismissed by the trial court. Such a claim if it has not now been barred by the most recent decision of the Minnesota Supreme Court, *In re Estate of Archibald G. Bush*, —— Minn. ——, No. 44707, decided November 22, 1974, could have been timely brought in state court. If in fact Petitioners are denied the right to have their claim adjudicated in a court of law, it is because Mrs. Bush and her guardians have failed to timely prosecute such a claim. The delay involved in this case was such that the trial court made particular mention of the fact at the close of its opinion. (A75).

3. The application of the doctrine of abstention by the trial court of Petitioners' claim is in fact supported by the rationale asserted in *Burford v. Sun Oil Co.*, (1943), 319 U.S. 315, and *Alabama Public Service Commission v. Southern Railway Co.*, (1951), 341 U.S. 341. The Petitioners, underneath all of the verbiage about the widow being defrauded of rights allegedly secured by contract, claim in essence that Mrs. Bush was deprived by fraud from taking a one-half share of her Husband's Estate which at the time of his death had a value of approximately $125,000,000.00. Adjudicating the Petitioners' case would require a construction of local probate law by the trial court to determine whether Mrs. Bush did in fact have such a right after her husband died, since a determination that one did not exist under Minnesota State Law now would cause

the instant damage claim for $100,000,000.00 to fail.[1] A resolution of this claim, therefore, we maintain, involves not only contract law but the administration of decedents' estates in the State of Minnesota which is properly considered a state activity that should be left to the state courts. The Circuit Court of Appeals correctly recognized this case as fitting the mold for abstention as enunciated in both the *Burford* case and the *Alabama Public Service Commission* case. (A84).

Petitioners erroneously construe *Brillhart v. Excess Insurance Company of America*, (1942), 316 U.S. 491, as support for their claims that the Abstention Doctrine is not applicable herein. However, the *Brillhart* case clearly recognized that the decision to accept or refuse to entertain a claim such as the instant one properly lies within the discretion of the trial court. This Court in *Brillhart* remanded the cause to the trial court so that the trial court could properly exercise its discretion in passing upon a Motion to dismiss the cause. Our trial court did follow the directives set in *Brillhart*, in that it did seek to determine whether issues raised in the present action were subject to determination in the state court proceedings. In fact, most of the trial court's opinion concerned itself with an exhaustive review of the contents of the complaint, related documents and pleadings, and issues raised in other state court litigation and proceedings prosecuted by Edyth Bush or on her behalf in the state courts.

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[1] Minnesota Statutes § 525.145 relating to descent of the homestead and Minnesota Statutes § 525.16 relating to the descent of all other property secures to the surviving spouse, where there are no surviving issue, the homestead and one-half of the decedent's personal property free from any testamentary disposition thereof to which the surviving spouse shall not have consented in writing or by election to take under the Will of the decedent. Edyth Bush, the surviving spouse, did give her written consent to her husband's Will (A15) and though the validity of such consent has been denied by her, the issue has never been adjudicated.

4. As to Petitioners' fourth reason for a grant of certiorari, we believe it has received an adequate reply in our brief discussion of the *Michigan National Corporation* case above.

CONCLUSION

Petitioners clearly have failed to bring their case within the scope of those areas of particular concern expressed in Rule 19 of this Court which would warrant a review on writ of certiorari. Further, as ably illustated by other Respondents herein, the case that the Petitioners seek to have submitted to the trial court is now moot. Therefore, Respondents urge that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be denied.

Respectfully submitted,

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